

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 98B043

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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SHAUN PATRICK SINKS,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,  
COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Respondent.  
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THIS MATTER came on for hearing on January 15, 1998 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Toni Jo Gray, Assistant Attorney General. Complainant appeared and represented himself.

Respondent's witnesses were Pueblo residents Alan Holiday, Marianne Clifford and Anne Kobus, Pueblo Police Officer Kenneth Rhodes, and Mary Lou Millbern, Director of Nutritional Services, Colorado Mental Health Institute at Pueblo. Complainant testified on his own behalf and called as a witness his mother, Sandy Herrera.

Respondent's Exhibits 1 through 9, except for Exhibit 5, were admitted into evidence without objection. Exhibit 5 was admitted over objection. Complainant's Exhibits A, C, D, E and G were admitted by stipulation. Exhibit F was admitted over objection. Exhibits I and J were excluded from evidence.

Exhibits 4 and 5, copies of police reports, were admitted as having been considered by the appointing authority in making the decision to terminate complainant's employment, not for the truth of the matter asserted.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, the disciplinary action is rescinded.

## ISSUES

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
4. Whether respondent is entitled to an award of attorney fees and costs.

## FINDINGS OF FACT

1. Complainant Shaun Patrick Sinks worked as a part-time Food Service Worker I for respondent Colorado Mental Health Institute at Pueblo (CMHIP) from April 15, 1996 until September 1997 when he became a full-time employee and worked in that capacity until he was dismissed on October 24, 1997. His duties were to prepare special diets for the geriatric ward and to serve on the tray line. Sinks is twenty years old.

2. Mary Lou Millbern is Director of Nutrition Services at CMHIP and is the appointing authority in this matter.

3. In early September 1997, Millbern took a telephone call from Sinks' mother informing her that Sinks would be able to report for work because he was in jail.

4. Millbern obtained a copy of the police report, which indicated that Spinks had been charged with commission of the felonies First Degree Burglary and Menacing and the misdemeanor of Prohibited use of a weapon. The charges stemmed from an incident of August 24, 1997 in which Sinks was alleged to have enter the apartment of another without permission, pointed a handgun at an individual and discharged the weopon outside of the apartment.

(Exhibit 4.)

5. Because he had been charged with a felony involving violence, Millbern immediately suspended Sinks with pay pending an internal investigation. (Exhibits 2 and C.) It was not her intent to await the disposition of the criminal charges.

6. In placing Sinks on administrative leave, Millbern took into account an earlier police report indicating that Sinks had been charged with the felonies of Criminal Mischief and Contributing to the Delinquency of a Minor on September 2, 1997. (Exhibit 5.) Millbern took no action with respect to these charges. Sinks returned to work the day following the incident giving rise to the charges. The current proceeding is a direct outgrowth of the alleged event of August 24, 1997.

7. Millbern's investigation consisted solely of her review of complainant's personnel file and Exhibits 4 and 5.

8. By letter dated September 23, 1997, Millbern advised Sinks of a predisciplinary meeting scheduled for September 26 to address the possible need for disciplinary action "based on reports that you allegedly were involved in misconduct and the commission of a felony." (Exhibits 3 and D.)

9. All allegations involved off-duty conduct. There were no allegations that Sinks had ever acted inappropriately in the workplace.

10. The R8-3-3 meeting was held on September 26, 1997. Sinks professed innocence of all charges against him, stating that he was not present at the scene of the alleged incident of August 24.

(Exhibit 6.) Because the charges were pending and his attorney had instructed him to not discuss the charges with anyone, Sinks provided no detailed information. Millbern granted ten days for Sinks to submit anything further in writing.

11. Sinks provided Millbern with a letter reiterating his innocence and stating that he was with his mother when he was alleged to be elsewhere on August 24, a fact that his mother would attest to, and that he has never carried a weapon. (Exhibits 7 and A.)

12. Millbern concluded that complainant's alleged conduct showed that he could be violent in certain situations and consequently violated Governor Romer's executive order entitled, "Workplace Violence", and the agency was adversely affected. She did not believe that Sinks' letter provided any additional information.

13. Executive Order 1096, "Workplace Violence", provides:

1. The state will not tolerate violent behavior or the threat of violent behavior directed by anyone toward state employees, customers, clients, state property or facilities. Such behavior may result in corrective and/or disciplinary action if it is committed by a state employee, and/or criminal charges when appropriate;

2. Possession of a firearm or weapon of any kind, including those defined by Colorado Revised Statute (C.R.S.) Title 18, Article 12, is prohibited at work, including in a state vehicle, except when such possession is a necessary requirement of an employee's job, or is approved by an appointing authority;

3. Violent behavior is defined as any act or threat of physical, verbal or psychological aggression or the destruction or abuse of property by any individual. Threats may include veiled, conditional or direct threats in verbal or written form, resulting in intimidation harassment harm or endangerment to the safety of another person or property;

4. This policy is not intended to preclude the use or threat of reasonable force, where appropriate, in the course of a state employee's assigned duties;

5. All threats to employee safety from any source, including domestic violence, occurring in the workplace, will be taken seriously and addressed appropriately;

6. Employees who believe they have been subjected to behavior prohibited by this policy, or who have observed any such behavior should report the incident to their supervisor or other appropriate authority. The supervisor or appointing authority will investigate and take appropriate action;

7. Copies of the Executive Order shall be distributed to all state departments and agencies and shall be displayed in prominent locations in their offices and facilities, particularly those locations in which notices are generally posted;

8. Agency managers are directed to evaluate their organization and take appropriate steps to address potential workplace violence situations.

(Exhibit 8.)

14. The Department of Human Services has formally adopted the

governor's executive order as a matter of policy. (Exhibit 8.)

15. Millbern did not believe Sinks' account of events and concluded that the conduct was especially serious because Sinks was alleged to have threatened someone. She felt that other employees would be intimidated by working with someone who had been charged with those kinds of offenses. Her primary concern was the seriousness of the allegations. The charges were the reason for her ultimate decision of termination.

16. Millbern felt that a corrective action would not remove the potential for violence in the workplace if Sinks continued his employment.

17. Millbern reviewed Sinks' performance evaluation and concluded that Sinks was disrespectful to his supervisors and co-workers. The evaluation suggests that Sinks "continue to treat co-workers and supervisors with respect." Listed as an employee strength are the comments: Shaun has improved his work habits and gets along well with co-workers. He is helpful in alerting supervisors to potential problems and suggesting ways to solve them." The overall performance rating was "Good." (Exhibit 9.)

18. Sinks had no prior corrective or disciplinary actions.

19. By letter dated October 22, 1997, the appointing authority terminated complainant's employment effective October 24, stating that the evidence showed that Sinks entered an apartment without authorization, aimed a deadly weapon at a human being and fired the weapon in the presence of other people. Millbern

concluded that Sinks' continued employment as a Food Service Worker I might have a serious adverse effect on the agency because of the potential for violence in the workplace and "a strong concern for the safety and security of patients and public property." (Exhibits 1 and E.)

20. Sinks was dismissed pursuant to Rule 8-3-3(C)(3)(iii). Which provides as follows:

(C) Causes for Administering Disciplinary Actions.  
Disciplinary actions may be administered for the following reasons:

(3) Wilful failure or inability to perform duties assigned.

(iii) Inability to perform duties includes being charged with a felony or any other offense involving moral turpitude, when such action or offense adversely affects the employee's ability or fitness to perform duties assigned or has an adverse effect on the agency should the employee continue such employment.

21. On November 12, 1997, all charges against Sinks that arose from the incident of August 24 were dismissed with prejudice by the Pueblo County District Court for lack of sufficient evidence to proceed. (Exhibit F.)

## DISCUSSION

In this disciplinary proceeding the burden is on respondent to

prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Under the preponderance standard, where evidence weighs evenly on both sides in a controversy, the fact finder must resolve the question against the party who has the burden of proof. *People v. Taylor*, 618 P.2d 1127, 1135 (Colo. 1980.)

#### CONCLUSIONS OF LAW

#### ORDER

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1998, at  
Denver, Colorado.

\_\_\_\_\_  
Administrative Law Judge

#### CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

and in the interagency mail, addressed as follows:

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